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3 UNITED STATES DISTRICT COURT
4 DISTRICT OF NEVADA

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6 TRAVIS BOWLES,

Case No. 3:18-cv-00272-MMD-WGC

7 Petitioner,

ORDER

8 v.

9 ISIDRO BACA, *et al.*,

10 Respondents.

11 **I. INTRODUCTION**

12 This *pro se* habeas petition filed under 28 U.S.C. § 2254 comes before the Court
13 on Respondents' motion to dismiss. (ECF No. 13.) Petitioner challenges his state court
14 judgment of conviction, following a jury trial, of six counts of lewdness with a child under
15 the age of fourteen. (Exhibit ("Ex.") 59.)¹ Respondents argue the petition is partially
16 unexhausted, procedurally defaulted, and non-cognizable. (ECF No. 13.) Petitioner has
17 not opposed, and the time for doing so has expired.

18 **II. DISCUSSION**

19 **A. Exhaustion**

20 Under 28 U.S.C. § 2254(b)(1)(A), a habeas petitioner must first exhaust state court
21 remedies on a claim before presenting that claim to the federal courts. To satisfy this
22 exhaustion requirement, the claim must have been fairly presented to the state courts
23 completely—to the highest state court level of review available. *See e.g., Peterson v.*
24 *Lampert*, 319 F.3d 1153, 1156 (9th Cir. 2003) (en banc); *Vang v. Nevada*, 329 F.3d 1069,
25 1075 (9th Cir. 2003). In the state courts, the petitioner must refer to the specific federal
26 constitutional guarantee and must also state the facts that entitle the petitioner to relief

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28 ¹The Court refers to the exhibits filed at ECF Nos. 14–18.

1 on the federal constitutional claim. See e.g., *Shumway v. Payne*, 223 F.3d 983, 987 (9th
2 Cir. 2000). That is, fair presentation requires that the petitioner present the state courts
3 with both the operative facts and the federal legal theory upon which the claim is based.
4 See e.g., *Castillo v. McFadden*, 399 F.3d 993, 999 (9th Cir. 2005). The exhaustion
5 requirement ensures that the state courts, as a matter of federal-state comity, will have
6 the first opportunity to pass upon and correct alleged violations of federal constitutional
7 guarantees. See, e.g., *Coleman v. Thompson*, 501 U.S. 722, 731 (1991).

8 Respondents argue that Ground 7, in part, Ground 8, and Ground 9 of the petition
9 are unexhausted. (ECF No. 13 at 5-7.) The Court will address each ground in turn.

10 **1. Ground 7**

11 In Ground 7, Petitioner alleges ineffective assistance of counsel. (ECF No. 4 at
12 15.) Ground 7(1)² asserts that Public Defender Nickel, who had a conflict of interest,
13 improperly represented Petitioner for three months before moving to withdraw. Ground
14 7(2) asserts that Nickel was ineffective for failing to challenge two continuances of the
15 preliminary hearing without Petitioner's consent, and that this also violated his speedy
16 trial rights. Ground 7(3) asserts that Nickel was ineffective for failing to challenge the
17 Affidavit of Probable Cause and the five criminal complaints that were submitted, added,
18 changed or replaced without procedural due process. Ground 7(4) asserts that Nickel
19 failed at the preliminary hearing to object to the prosecutor's leading questions of its own
20 complaining witness. Finally, Ground 7(5) asserts that Nickel was ineffective for failing to
21 cross examine the State's witness as to prior consistent statements and for failing to
22 demand discovery.

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28 ²Respondents refer to the sub-parts of Ground 7 as 7(a) through 7(e). However, Petitioner has provided his own numbering, (1) through (5), so the Court references Ground 7's subparts using Petitioner's designations in the petition.

1 Save for Ground 7(1), which is exhausted, the remainder of Ground 7 has never
2 been presented to, nor actually decided by, the state's highest courts. (See Exs. 75, 81,
3 83, 161, 167, 169.) Grounds 7(2) through 7(5) are therefore unexhausted.

4 **2. Ground 8**

5 In Ground 8, Petitioner asserts that appellate counsel was ineffective for failing to
6 raise numerous instances of prosecutorial misconduct and vindictiveness, but he does
7 not elaborate on what those instances were. The remainder of Ground 8 complains of the
8 state court's handling of this claim during postconviction proceedings. (ECF No. 4 at 17.)

9 As will be discussed *infra*, the latter part of Ground 8 is not a cognizable claim. The
10 remainder of Ground 8 is unexhausted, as it has not ever been presented to or actually
11 decided by the state's highest courts. (See Exs. 75, 81, 83, 161, 167, 169.)

12 **3. Ground 9**

13 In Ground 9, Petitioner asserts that appellate counsel was ineffective for not
14 arguing that the district court failed to confirm it had jurisdiction over the petitioner, violated
15 his due process rights, and allowed leading questions of the two minor complaining
16 witnesses during the preliminary hearing. (ECF No. 4 at 19.) None of these claims has
17 been presented to, or actually decided by, the state's highest courts. (See Exs. 75, 81,
18 83, 161, 167, 169.) Ground 9 is therefore unexhausted.

19 **B. PROCEDURAL DEFAULT**

20 Respondents argue that Ground 4 is procedurally defaulted. (ECF No. 13 at 8.)
21 Ground 4 asserts counsel was ineffective for failing to argue that the criminal statute under
22 which Petitioner was convicted was unconstitutional as applied. (ECF No. 4 at 9.)
23 Respondents, apparently interpreting Ground 4 as asserting only the underlying
24 substantive claim, argue that Ground 4 is procedurally defaulted because the Nevada
25 Court of Appeals found the substantive claim procedurally barred.

26 A federal court cannot review a claim "if the Nevada Supreme Court denied relief
27 on the basis of 'independent and adequate state procedural grounds.'" *Koerner v. Grigas*,

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1 328 F.3d 1039, 1046 (9th Cir. 2003) (citation omitted). In *Coleman v. Thompson*, the
2 Supreme Court held that a state prisoner who fails to comply with the state’s procedural
3 requirements in presenting his claims is barred from obtaining a writ of habeas corpus in
4 federal court by the adequate and independent state ground doctrine. See 501 U.S. 722,
5 731-32 (1991). A state procedural bar is “adequate” if it is “clear, consistently applied, and
6 well-established at the time of the petitioner’s purported default.” *Calderon v. United*
7 *States District Court (Bean)*, 96 F.3d 1126, 1129 (9th Cir. 1996). A state procedural bar
8 is “independent” if the state court “explicitly invokes the procedural rule as a separate
9 basis for its decision.” *Yang v. Nevada*, 329 F.3d 1069, 1074 (9th Cir. 2003). A state
10 court’s decision is not “independent” if the application of the state’s default rule depends
11 on the consideration of federal law. See *Park v. California*, 202 F.3d 1146, 1152 (9th Cir.
12 2000).

13 Respondents are correct that the Nevada Court of Appeals found the substantive
14 as-applied claim procedurally barred pursuant to Nev. Rev. Stat. § 34.810(1)(b), as it
15 could have been, but was not, raised on direct appeal. (Ex. 169 at 5.) The Ninth Circuit
16 has held that application of this bar is an independent and adequate state ground for
17 procedural default. See *Vang v. Nevada*, 329 F.3d 1069, 1074 (9th Cir. 2003). Thus, the
18 substantive aspect of Ground 4—to the extent it is asserted—is procedurally defaulted.

19 Where such a procedural default constitutes an adequate and independent state
20 ground for denial of habeas corpus, the default may be excused only if “a constitutional
21 violation has probably resulted in the conviction of one who is actually innocent,” or if the
22 prisoner demonstrates cause for the default and prejudice resulting from it. See *Murray*
23 *v. Carrier*, 477 U.S. 478, 496 (1986).

24 To demonstrate cause for a procedural default, the petitioner must “show that
25 some objective factor external to the defense impeded” his efforts to comply with the state
26 procedural rule. See *Murray*, 477 U.S. at 488. For cause to exist, the external impediment
27 must have prevented the petitioner from raising the claim. See *McCleskey v. Zant*, 499

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1 U.S. 467, 497 (1991). With respect to the prejudice prong, the petitioner bears “the burden
2 of showing not merely that the errors [complained of] constituted a possibility of prejudice,
3 but that they worked to his actual and substantial disadvantage, infecting his entire
4 [proceeding] with errors of constitutional dimension.” *White v. Lewis*, 874 F.2d 599, 603
5 (9th Cir. 1989) (citing *United States v. Frady*, 456 U.S. 152, 170 (1982)).

6 Petitioner has failed to argue, much less establish, cause and prejudice to excuse
7 the procedural default of the substantive aspect of Ground 4. The motion to dismiss
8 Ground 4 to the extent it asserts the substantive as-applied claim will therefore be
9 granted. The procedural default does not, at this juncture at least, extend to all of Ground
10 4. As noted, Ground 4 is primarily an ineffective assistance of counsel claim. That claim
11 has never been presented to the state’s highest courts and is therefore unexhausted.
12 Accordingly, Ground 4 is procedurally defaulted to the extent it asserts a substantive as-
13 applied constitutional claim and unexhausted to the extent it asserts an ineffective
14 assistance of counsel claim.

15 **C. COGNIZABLE CLAIMS**

16 In the latter part of Ground 5, which Respondents designate as 5B, Petitioner
17 asserts that the state district court violated his Fifth Amendment due process rights by not
18 conducting an evidentiary hearing on his claim that counsel was ineffective for failing to
19 challenge the language of the charging documents and jury instructions. (ECF No. 4 at
20 11.) In part of Ground 6, which Respondents designate as 6B, Petitioner asserts that the
21 district court failed to conduct an evidentiary hearing on his postconviction claim that
22 counsel was ineffective for failing to file a motion to suppress. (ECF No. 4 at 13.)
23 Respondents correctly argue that these claims are not cognizable on federal habeas
24 review. See *Franzen v. Brinkman*, 877 F.2d 26, 26 (9th Cir. 1989) (“[E]rrors in the state
25 post-conviction review process [are] not addressable through habeas corpus
26 proceedings.”). The motion to dismiss Grounds 5 and 6 in part, to the extent they assert
27 the above claims based on state postconviction proceedings, will therefore be granted.

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1 Ground 8 also asserts, in part, a similar claim based on the trial court's handling of
2 the postconviction petition. To this extent, Ground 8 is not cognizable, and will also be
3 dismissed.

4 **III. OPTIONS ON A MIXED PETITION**

5 A federal court may not entertain a habeas petition unless the petitioner has
6 exhausted all available and adequate state court remedies for all claims in the petition.
7 See *Rose v. Lundy*, 455 U.S. 509, 510 (1982). A "mixed petition" containing both
8 exhausted and unexhausted claims is subject to dismissal. *Id.* Because Petitioner's
9 petition is mixed, he has three options:

10 1. File a motion to dismiss seeking partial dismissal of only the unexhausted
11 claims;

12 2. File a motion to dismiss the entire petition without prejudice in order to return to
13 state court to exhaust the unexhausted claims; and/or

14 3. File a motion for other appropriate relief, such as a motion for a stay and
15 abeyance asking this Court to hold his exhausted claims in abeyance while he returns to
16 state court to exhaust the unexhausted claims.

17 **IV. CONCLUSION**

18 It is therefore ordered that Respondents' motion to dismiss (ECF No. 13) is granted
19 in part and denied in part as follows:

20 1. Grounds 4, in part, 7(2), 7(3), 7(4), 7(5), 8 and 9 are unexhausted;

21 2. Ground 4 is dismissed with prejudice, in part, to the extent it asserts a
22 substantive constitutional as-applied claim as procedurally defaulted; and

23 3. Grounds 5, 6 and 8 are dismissed with prejudice to the extent they assert
24 claims based on errors in the state postconviction process.

25 It is further ordered that, within 30 days of the date of entry of this order, Petitioner
26 must file either: (1) a motion to dismiss the unexhausted claims without prejudice; (2) a
27 motion to dismiss the entire petition without prejudice so that he may return to state court

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1 to exhaust his unexhausted claims; or (3) a motion for other appropriate relief, including
2 a motion to stay and abey his exhausted claims while he returns to state court to exhaust
3 his unexhausted claims. Failure to timely comply with this order will result in the dismissal
4 of this mixed petition without prejudice, and without further advance notice.

5 DATED THIS 16th day of May 2019.



MIRANDA M. DU
UNITED STATES DISTRICT JUDGE

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